SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 46.

ARTHUR M. MANIGAULT, APPELLANT,

versus

A. A. SPRINGS AND ST. J. M. LACHICOTTE, CO-PARTNERS IN BUSINESS UNDER THE FIRM NAME OF S. M. WARD & CO., APPELLEES.

BRIEF OF ARGUMENT ON BEHALF OF APPELLANT.

I.

STATEMENT OF THE CASE.

1.

Character of Appeal.

This appeal is from a final decree sustaining a demurrer to the bill and dismissing the bill.

2.

Parties.

The complainant, the owner of a rice plantation, is a riparian proprietor on a navigable stream or creek in the State of South Carolina. The defendants are adjoining land owners on the same stream. The stream had been used by all parties for purposes of navigation and access to their respective properties.

3.

Hearing Below.

The case was heard below upon bill and demurrer, and this appeal is from the decree sustaining the demurrer and dismissing the bill. Before the hearing of the demurrer an interlocutory application had been made to the Circuit Judge at chambers for a temporary injunction. Upon this interlocutory application the court declined to issue the injunction. (*Manigault* v. *Ward & Co.*, 123 Fed. Rep., 707.)

Thereafter a demurrer to the whole bill was filed and the case coming on to be heard upon the demurrer, the court dismissed the bill.

4.

Facts of the Case.

Under the demurrer, the facts are admitted as stated in the bill. (*Transcript, ff. 1-10.*)

In 1898, and for some time prior, the complainant and two defendants, together with one F. W. Ford, were all adjoining land owners and riparian proprietors, planting rice on their respective plantations, on or near a creek known as Kinloch creek, on Santee river, in Georgetown county, in South Carolina. This creek furnished access as an highway to all the respective proprietors. At that time the defendants constructed a bank across Kinloch creek for their own purposes. This bank across Kinloch creek was objected to by the complainant herein, and the said F. W. Ford, as an interference with and an obstruction to their rights of passage and irrigation. The complainant further objected that the effect of the bank was to injure him on his lands adjacent to Kinloch creek by compelling him to raise his dykes around his lands. After a contest, a contract of agreement was entered into under seal and executed by the parties whereby it was agreed that the obstruction or bank across Kinloch creek should be continued until the 31st day of December, 1898; but that from and after the 31st day of December, 1898, this obstruction or bank should be removed so as to give the complainant and F. W. Ford clear passage through the creek, and should never be replaced. (*Transcript, ff. 12-14.*)

Matters so continued until March, 1903, when the defendants procured a statute from the Legislature of South Carolina allow-

ing them to dam this creek, notwithstanding their contract. At the time this statute was passed the law of South Carolina provided that no franchise, privilege or immunity for any private purpose should be introduced or entertained in the General Assembly of the State unless a petition for the same should be addressed to the General Assembly, and all parties to be affected thereby had been given notice of such petition sixty days before the presentation of such petition to the General Assembly, and notice of the intention to present the same had also been published in the county where the privilege or immunity was to be enjoyed, once a week for at least three weeks before such petition was presented. (*See Sect. 31 and 34 of the Code of Laws of S. C. in appendix to this argument.*)

The defendants made no such petition to the General Assembly, nor did they give any notice to the complainant herein of their intention to present it, nor was any notice of the same published before its presentation, but without notice of any kind to the complainant, or any publication of intention, the defendants procured the passage through the Legislature of an act allowing them to erect a dam across Kinloch creek.

Upon plaintiff being advised of the passage of this act, and defendants proceeding to erect the dam, the present bill was filed for an injunction to prevent them erecting the same.

5.

Decree.

The decree in general terms sustained the demurrer and dismissed the bill. (*Transcript, fo. 34.*)

II.

SPECIFICATIONS OF ERROR.

1.

That the court erred in not holding that the enacting of the statute of the General Assembly of the State of South Carolina, approved 3rd March, 1903, annexed as Exhibit "C" to the bill of complaint, was the passing by the State of South Carolina of a law impairing the obligation of a contract by annulling, or attempting to annul, or avoid, the contract and covenant entered

into by the defendants with the complainant, in and by their agreement under seal referred to in and annexed as Exhibit "B" to the bill of complaint, and that such statute of the State of South Carolina was the passing of a law in contravention of the provisions of Article I, Section 10, of the Constitution of the United States.

2.

That the court erred in not holding that the provisions of the Constitution of South Carolina, declaring that all navigable waters should forever remain public highways, was a right and privilege annexed to and constituting a part of the value of the lands and properties of the complainant situated upon such navigable waters, and that the damming of Kinloch creek and its consequent closing as a navigable water highway, except for the purposes of the public health, the public welfare or the public safety, and after due compensation therefor, is a destruction of part of the value of the property of the complainant given to him at the time of his acquisition thereof by the Constitution and laws of the State of South Carolina; and the passage of the said statute by the General Assembly of the State of South Carolina was an impairment of the obligation of the contract so entered into by the complainant when he was permitted to acquire said property, and is the taking of the property of the complainant without compensation therefor, and the depriving of the complainant of his property without due process of law in contravention of Section 1 of Article XIV of the amendments of the Constitution of the United States.

3.

That the court erred in not holding that the complainant, as the owner of the property abutting on a navigable stream, to-wit, Kinloch creek, had as part of his private property, the right of a riparian owner, to-wit, the right of unobstructed passage to and from his said property on and over the waters of Kinloch creek, and that the closing of Kinloch creek by the passage of the said statute, and the loss of access thereby to the property of the complainant and the consequent damage to the lands of the complainant abutting on or contiguous to said Kinloch creek, is the taking of the property of complainant without

his consent, and without compensation therefor, in contravention of the provisions of Article I, Section 10, of the Constitution of the United States, and of Section 1 of Article XIV of the amendments to the Constitution of the United States, and of Section 17, Article I, of the Constitution of South Carolina.

4.

That the court erred in not holding that the aforesaid statute passed by the State of South Carolina, approved March 3rd, 1903, was a statute passed for the private purposes of the defendants and to release them from the obligation of their aforesaid contract with the complainant, and was not a statute passed in the exercise of any of the police powers of the State for the public health, the public welfare or the public safety, or for any public purposes soever.

5.

That the court erred in not holding that the enactment of the aforesaid statute, approved March 3rd, 1903, by the General Assembly of the State of South Carolina, was the enacting of a local and special law, concerning the opening of highways, and was in contravention of Article III, Section 34—Subdivision XI, of the Constitution of the State of South Carolina.

6.

That the court erred in not holding that in and by Sections 31 and 34 of Article III, Chap. II, Title 1, of the Code of Laws of South Carolina, 1902, and Sections 31 and 34 of Article III, Chapter II, Title 1, of the Revised statutes of South Carolina, 1893, it is declared that no bill for the granting of any privilege or immunity, or for any other private purpose whatsoever, should be introduced or entertained in either house of the General Assembly, except by a petition to be signed by the person or persons desiring any such privilege or immunity, or private grant; of which petition all parties, the rights of whom shall be in anywise proposed to be affected, shall have sixty days' notice of the presentation before the same is presented to the General Assembly, and further and additionally that notice of the intention of petitioners to make such application, must be published in the newspaper having the largest circulation in the county

where the privilege or immunity is to be enjoyed, once a week, for at least three weeks, the first of which publications is to be made at least sixty days before such is presented, and that such requirements of the statutes of South Carolina constituted part of the rights to which private owners of property affected by such intended application or petition were entitled, and that the passage of the aforesaid statute of the 3rd March, 1903, was in contravention of the said laws of the State of South Carolina, and was an impairment of the contract entered into by the complainant when he purchased and acquired the property referred to in the bill of complaint, and was the taking of his property without compensation, and without due process of law.

III.

POINTS OF LAW.

There are five points involved in the discussion on the statute.

1. The impairment of a contract.
2. The deprivation of property without due process of law.
3. That it closes a highway without compensation.
4. It is the passage of special legislation.
5. That no notice of intended passage was given.

The two first questions are Federal, arising under the Constitution of the United States; the three last arise under the State Constitution.

These last are necessarily to be discussed and decided under the rule:

"If on the face of the complaint or declaration, the case is "one which the court has the power to hear and determine, be- "cause of the existence of a Federal question, it has the right "to decide every issue that may subsequently be raised, and "whether the decision of the case ultimately turns on a question "of Federal, local or general law is a matter that in no wise "affects the jurisdiction of the court."

St. Paul M. & M. Ry Co. v. *St. Paul N. P. Ry. Co.,* 68 Fed. Rep., 10.

Mayor v. *Cooper,* 6 Wall., 247.

Railroad Co. v. *Mississippi,* 102 U. S., 141.

Tennessee v. *Davis,* 100 U. S., 257.

1.

The Impairment of a Contract.

The main question in the whole case is that of the impairment of a contract, and involves first the point whether there was or was not a contract.

Was There a Contract?

Upon the face of it the answer to this question can be only an affirmative. There is undoubtedly a contract in writing entered into and duly executed under seal. The terms of that contract are clear and explicit. The defendants, Ward & Co., claimed the right to obstruct Kinloch creek by a dam across it. The complainant denied their right, and a compromise was entered into whereby upon the complainant's consenting to the dam remaining until the 31st day of December, 1898, the defendants bound themselves under seal that after that date that dam might be removed by the plaintiff so as to entirely free and clear the creek without any let, hindrance, objection, delay or molestation whatsoever in act or procurance on the part of defendants. We have therefore a case where for the settlement of a question of disputed right and for consideration given, there is an express covenant under seal on the part of the two defendants to this present bill of complaint binding themselves not to interfere, directly or indirectly, either by act or procurance, with the entire clearing of the creek from all obstruction. (*Transcript, ff. 12, 15.*)

The demurrer avers that the contract is no contract enforceable on any account, because it appears on its face that it was without a good or valuable consideration.

But it was made under seal, and that imports a consideration.

Storm v. *U. S.*, 94 U. S., 84.

It contained mutual concessions and covenants, and they are a sufficient consideration.

Park Bros. & Co. v. *Kelly*, 49 Fed. Rep., 625.

Does the Statute Impair the Contract?

Does the statute in question impair the obligation of this contract? Upon the face of it also the answer to this question

can only be in the affirmative. The statute in question undertakes not simply to impair but entirely to annul and abrogate this contract. (*Transcript, ff. 16-18.*) The statute undertakes to authorize the same two individuals who made the contract to ignore it. It authorizes these two individuals as individuals to do exactly what they had bound themselves by the contract to do—*i. e.*, to put a dam across Kinloch creek and close it by an obstruction. The contract and the statute are on the face of each document in absolute and irreconciliable conflict. By the contract the defendants bind themselves not to obstruct Kinloch creek; by the statute they are expressly granted the right, power and privilege to obstruct and close Kinloch creek.

Prima facie the right is entirely with Manigault, the complainant. He has an express contract which binds the defendants, and the defendants are refusing compliance with their contract, on the ground that the statute has justified them in so doing.

It is true the statute does not mention or refer to the contract, but its intended effect is as clear as if it did.

It has been frequently held by this court that legislation impairing contracts is obnoxious to the constitutional provision, although all reference to the contracts to be affected is carefully avoided. The statute is construed by its *effect.*

The subject matter of the contract was entirely within the scope of a covenant.

It related to the exclusive or joint use of the creek. Even were the right of a public character, an individual can (except where forbidden by public policy) bind himself not to exercise said right.

Oregon & Co. v. *Winsor,* 20 Wall., 64.
Hulse v. *Bonsach Machine Co.,* 65 Fed. Rep., 864.

The real position of defendants is that the statute is valid as an exercise by the State of its police power. That in the exercise of the police power the State has the right to pass a statute, although the effect of such statute may be to impair a contract.

The Police Power.

Is the statute an exercise of the police power?

The statute, upon the face of it, does not purport to be in exercise of any police power. It is the grant of a right, power

and privilege; in other words, the grant of a *franchise* to two individuals who are co-partners under the firm name of S. M. Ward & Co. It recites that the value of their private lands will be much enhanced if they are allowed to erect a dam across Kinloch creek, and then grants to the individuals, their heirs and assigns, this privilege. The entire act is for the benefit, and sole benefit, of the lands owned by these individuals. The statute notes that there are other lands in the vicinity owned by other individuals, but it does not purport to give any such privilege to the other owners of land in the vicinity or the public. The privilege is restricted to the two individuals named, the defendants in this suit, and is granted to them irrespective of the benefit or advantage to other adjoining land owners. It is a personal grant of a personal franchise for the direct personal benefit of the parties named. Upon the face of it, therefore, the statute is not in the exercise of the police power of the State and for the benefit of the State as a whole, not being a statute passed for the protection of the public health, the public safety or the public morals.

This court has so far refrained from any attempt to define the term "police power."

(*Jacobson* v. *Massachusetts*, 197 U. S., 251.)

The principles of construction applicable to statutes as a test whether they have been properly passed in the exercise of the police power have been enunciated.

"they must have some relation to these ends. Under the "mere guise of police regulations, personal rights and private "property cannot be arbitrarily invaded, and the determination "of the Legislature is not final or conclusive. If it passes an "act ostensibly for the public health, and thereby destroys or "takes away the property of a citizen, or interferes with his "personal liberty, then it is for the courts to scrutinize the act "and see whether it really relates to and is convenient and "appropriate to promote the public health. It matters not that "the Legislature may in the title to the act, or in its body, de-"clare that it is intended for the improvement of the public "health." * * *

"Whether or not a use is a public one which will justify the "exercise of the power, is a judicial question. It may be diffi-"cult sometimes to determine whether a use is public or private. "Although the Legislature may declare it to be public, that does

"not necessarily determine its character; it must in fact be pub-
"lic, and if it be not, no legislative fiat can make it so, and any
"owner of property attempted to be taken for a use really pri-
"vate can invoke the aid of the courts to protect his property
"rights against invasion."

* * * * * * *

"the courts must be able to see that it has at least in
"fact some relation to the public health, that the public health
"is the end actually aimed at, and that it is appropriate and
"adapted to that end."

In re Jacobs, 98 N. Y., 98. (pp. 110, 111, 115.)

"To justify the State in thus interposing its authority on
"behalf of the public, it must appear first, that the interests of
"the public generally, as distinguished from those of a particu-
"lar class, require such interference; and second, that the means
"are reasonably necessary for the accomplishment of the pur-
"pose and not unduly oppressive upon individuals. The Legisla-
"ture may not under the guise of protecting the public interests
"arbitrarily interfere with private business."

Lawton v. *Steele,* 152 U. S., 133.

"The courts are not bound by mere forms, nor are they to be
"misled by mere pretenses. They are at liberty—indeed, are
"under a solemn duty—to look at the substance of things, when-
"ever they enter upon the inquiry whether the Legislature has
"transcended the limits of its authority. If, therefore, a
"statute purporting to have been enacted to protect the public
"health, the public morals, or the public safety, has no real
"or substantial relation to those objects, or is a palpable in-
"vasion of rights secured by the fundamental law, it is the duty
"of the courts to so adjudge and thereby give effect to the Con-
"stitution."

Mugler v. *Kansas,* 123 U. S., 661.

The statute in question is clearly on the face of it not a measure intended for the public health, the public safety, or the public morals.

Under the police power the State may *destroy* obnoxious or pernicious property or substances, but it cannot *appropriate* them for public use.

It is *prohibitive,* not *constructive,* as applied to the use of individual property or the regulation of individual pursuits.

It can *destroy* diseased cattle, or impure foods, or liquor, or

obscene pictures, or any article adjudged to be obnoxious to the public health, morals or safety—but it cannot appropriate and use them for public or private purposes, save under the exercise of the power of eminent domain and after due compensation.

Leovy vs United States Not Applicable.

The case relied upon by the counsel for the defendants below and apparently by the learned Judge in his decision on the demurrer is the case of *Leovy* v. *U. S.*, 177 U. S., 621. This case, however, so far from being an authority in favor of defendants' position, is an authority against it. The facts of that case were as follows: Robert S. Leovy was the syndic or official of the ward in which a stream or crevasse known as "Red Pass" was situated. The Police Jury of the Parish of Plaquemines passed a resolution directing the syndic to have "Red Pass" closed by a dam, in order to promote the health of the community. "Red Pass" was not a natural stream, but was in the nature of a crevasse caused by the overflow of water from the Mississippi river. The object of closing "Red Pass" was by the construction of a levee at that point to prevent the overflow from the Mississippi river passing through "Red Pass" into the adjoining country.

An indictment was found against Leovy for erecting this dam as in contravention of the act of Congress of September 13, 1890, forbidding the erection of any obstruction in any navigable waters of the United States without the permission of the Secretary of War. The indictment charged that this dam had been constructed across a navigable water of the United States without the permission of the Secretary of War. The only question in the case was whether "Red Pass" was a navigable water of the United States in such a sense that a dam could not be erected therein without the previous authorization of the Secretary of War.

The Supreme Court decided that in the absence of any express legislation of the United States forbidding the construction of such a dam the existing acts of Congress were not intended to apply to the case of a stream of the history and character disclosed in the record, and that the State authorities were left free to act in such a manner as they thought fit to promote the health and prosperity of the people concerned. It will be seen that the entire question in that case was as to the right to

dam this crevasse without the authority of the Secretary of War. Whether, assuming as the court did assume, that the act of the public syndic in closing "Red Pass" was an official act done by a State official for the purpose of promoting the public health, the closing a stream or crevasse of the character of "Red Pass" was a violation of the act of Congress? This court decided that it was not. No question of the right or property of individuals was concerned, nor were they ever disclosed in the case. The entire discussion turned upon the question whether the State could obstruct a stream of the character of "Red Pass," when by the evidence furnished it did not appear to the court to be a navigable stream of the United States within the meaning of the act of Congress.

No such question exists in the case at bar. The bill alleges, and the demurrer admits, that Kinloch creek, the creek in question, is a navigable stream or water highway. If the question before the court was whether the defendants had the right to obstruct Kinloch creek without the permission of the Secretary of War, the court would be bound under the admission of the demurrer to hold that as it was admitted to be a navigable stream of the United States, and under the principles decided in the "Red Pass" case, it could not be obstructed without the permission of the Secretary of War. That, however, is not the question. The question is whether the State can, under the guise of a police measure, permit private individuals to annul their contract and obstruct a dam across a navigable stream, to the injury of other individuals? By the analysis of the act, we have shown that upon the face of it the act does not purport to be for the public health, but for the purpose only of allowing certain private individuals to construct the dam for the enhancement of their own particular property. This privilege of constructing a dam is not given to them for the benefit of the community, but is given to them personally so that they can construct or not construct as they see fit.

It follows that the contention of the defendants that this statute abrogating their contract can be sustained as an exercise of the State's police power, cannot be sustained.

Can it be sustained as an exercise of the power of eminent domain?

2.

The Deprivation of Property Without Compensation or Due Process of Law.

The defendants in their position below attempted to justify the statute by insisting that it was a valid exercise of the State's power for the general welfare. If so, it could not be so regarded as coming under the *police power*, and could only be treated as the exercise by the State of this right of *eminent domain*.

Eminent Domain.

The State has unquestionably the right to use or appropriate private property for public purposes, but in such case the public must bear the burden of *compensation* to the individual injured for its benefit.

The distinction is clear.

Under the police power, the State can regulate the use but not destroy the existence of private property, except where that property is in itself positively pernicious to the public welfare, and its existence forbidden by law, as in the case of dynamite or liquor or diseased cattle.

In such case, the damage to the individual incidental to such regulation is not a damage that he is entitled to receive compensation for.

Under the power of eminent domain, the State can appropriate private property for public purposes, but only on condition of full compensation to the party whose property is appropriated.

The Constitution of the State of South Carolina provides, Art. I, Sect. 17:

"Private property shall not be taken for private use without " the consent of the owner, nor for public use without just com- " pensation being first made therefor."

When payment of compensation before taking private property for public use is expressly required by constitutional provisions; payment, or its equivalent tender of payment, is a condition precedent to the taking, and where the Constitution expressly requires prepayment, it is, of course, beyond the power

of the Legislature to authorize taking without prepayment, and any statute assuming to do so is void.

The complainant is a riparian proprietor on a navigable stream.

The Constitution of South Carolina declares, Art. I, Section 28:

"All navigable waters shall forever remain public highways, " free to the citizens of the State and the United States without " tax, impost, or toll imposed."

And Section 29:

"The provisions of the Constitution shall be taken, deemed " and construed to be mandatory and prohibitory, and not " merely directory, except where expressly made directory or " permissory by its own terms."

The statute law provides, Title X, Chap. XXVIII, Section 1335, of the Code of Laws, 1902:

"All streams which have been rendered, or can hereafter be " rendered capable of being navigated by rafts of lumber or " timber by the removal of accidental obstruction, and all navi- " gable water courses and cuts are hereby declared navigable " streams, and such streams shall be common highways, and " forever free as well to the inhabitant of this State as to the " citizens of the United States, without any tax or impost there- " for, unless the same be expressly provided for by the General " Assembly."

The common law with regard to riparian proprietors is the law of South Carolina.

McCullough v. *Wall*, 4 Rich., 68.
Shands v. *Triplett*, 5 Rich. Eq., 78.

As a riparian proprietor, the complainant is entitled not only to the free use of the stream as a highway, but

" he is certainly entitled to the rights of a riparian proprietor " whose land is bounded by a navigable stream; and among " those rights are access to the navigable part of the river from " the front of his lot, the right to make a landing wharf or pier " for his own use, or for the use of the public, subject to such " general rules and regulations as the Legislature may see

" proper to impose for the protection of the rights of the public,
" whatever those may be."

* * * * * * *

"This riparian right is property, and is valuable, and though
" it must be enjoyed in due subjection to the rights of the public,
" it cannot be arbitrarily or capriciously destroyed or impaired.
" It is a right of which when once vested, the owner can only
" be deprived in accordance with established law, and if neces-
" sary that it be taken for the public good, upon due compensa-
" tion."

Yates v. *Milwaukee,* 10 Wall., 497.

Approved and confirmed in *Weber* v. *Harbor Commissioners,* 18 Wall., 57.

Potomac Steamboat Co. v. *Upper Pot. S. Co.,* 109 U. S., 682.

"The riparian proprietor is entitled, among other rights as held
" in *Yates* v. *Milwaukee,* 10 Wall., 497, 504, to access to the
" navigable part of the water on the front of which lies his land,
" and for that purpose to make a landing wharf or pier for his
" own use, or for the use of the public, subject to such general
" rules and regulations as the Legislature may prescribe for the
" protection of the rights of the public."

Illinois Central R. R. v. *Illinois,* 146 U. S., 445.

Nor is this rule in its application to the present case at all affected by the decisions in

Shively v. *Bowlby,* 152 U. S., 1.
Gibson v. *U. S.,* 166 U. S., 269.
Scranton v. *Wheeler,* 179 U. S., 141.

In *Shively* v. *Bowlby* the point decided was that

"The title and rights of riparian or littoral proprietors in the
" soil below the high water mark therefore, are governed by the
" laws of the several States, subject to the rights granted to the
" United States by the Constitution." (p. 58.)

In *Gibson* v. *U. S.* the point decided was that all riparian proprietors on navigable streams held then these rights subject to the servitude of the right of the State or United States to regulate or *improve navigation.*

"Moreover, riparian ownership is subject to the obligation to
" suffer the consequences of the improvement of navigation in

"the exercise of the dominant right of the government in that "regard." (p. 276.)

In *Scranton* v. *Wheeler* the same point was decided, p. 164:

"The riparian owner acquired the right of access to naviga- "bility subject to the contingency that such right might become "valueless in consequence of the erection under competent au- "thority of structures on the submerged lands in front of his "property for the purpose of improving navigation."

But this court adds, p. 164:

"When erecting the pier in question the government had no "object in view except in the interest of the public to improve "navigation. It was not designed arbitrarily or capriciously "to destroy rights belonging to any riparian owner."

From these decisions it follows that the rights of a riparian proprietor are not absolute, but subject to a servitude, viz., the right of the dominant sovereignty, State or Federal, to *improve navigation.*

In all other respects his rights, when once vested, are the same as those of any other landowner, subject to no servitude as such, but subject, of course, to the right of the dominant power sovereignty, State or Federal, to *take* or appropriate his riparian properties for public use, but upon payment of compensation.

In the case before the court the statute does not pretend to be for the *improvement of navigation.* It does not pretend to be for any public purpose beyond the enhancement of the taxable value of the lands of the defendants, and in order to enhance the value of the defendants' lands, the legislature authorizes those defendants, if they see fit, to erect a dam which will reduce the value of the complainant's property.

So far from the statute being a statute to *improve* navigation, it is intended to *destroy* navigation, and by closing the creek to prevent all access by riparian proprietors.

The State of South Carolina, it may be, could have provided in its Constitution that the rights of all riparian proprietors should be held subject to the power of the State to deal with them as it saw fit. It has not done so. It has declared to all riparian proprietors that they have all the rights pertaining to such at common law, and guaranteed that all such navigable

streams should be forever free and open highways, subject only to the right of the State to deal with them as the public interests required for the purpose of the *improvement of navigation.*

"If they choose to resign to riparian proprietors rights which " properly belong to them in their sovereign capacity, it is not " for others to raise objections."

Barney v. *Keokuk,* 94 U. S., 324.
Packer v. *Bird,* 137 U. S., 661.
Hardin v. *Jordan,* 140 U. S., 371.

Deprivation of Due Process of Law.

The rule is well settled that the taking by statute of the private property of a person or corporation is not due process of law.

Yates v. *Milwaukee,* 10 Wall., 504.
Pumpelly v. *Green Bay Co.,* 13 Wall., 166.

"The taking by a State of the private property of one person " or corporation without the owner's consent for the private " use of another is not due process of law, and is a violation of " the Fourteenth Article of Amendment of the Constitution of " the United States."

Missouri Pac. Ry. v. *Nebraska,* 164 U. S., 417.

"Recognizing the difficulty of defining with exactness the " phrase 'due process of law,' it is certain that these words im- " ply a conformity with natural and inherent principles of jus- " tice and forbid that one man's property or right to property " shall be taken for the benefit of another, or for the benefit of " the State, without compensation."

Holden v. *Hardy,* 169 U. S., 383.

"The permission, or command of the State, can give no power " to invade private rights, even for a public purpose, without " payment of compensation."

Muhlker v. *New York & H. R. Co.,* Sup. Ct. U. S., decided 10 April, 1905; 25 Sup. Court Reporter, 523.

Anterior to the Fourteenth Amendment.

The cases relied on by the counsel for the defense in the argument below were

Wilson v. *Black Bird Creek Marsh Co.*, 2 Pet., 247.
Gilman v. *Philadelphia*, 3 Wall., 713.

In the case of *Wilson* v. *Black Bird Creek Marsh Co.* the legislature of Delaware had authorized a corporation to construct a dam across Black Bird Creek. The question was only whether this was in violation of the clause of the United States Constitution giving the United States power "to regulate commerce with foreign nations and among the several States." The court decided it was not. There was no question here of the impairment of a contract, nor of the destruction of riparian rights.

"But the measure authorized by this act stops a navigable "stream, and must be supposed to abridge the rights of those "who have been accustomed to use it; but the abridgement, "unless it comes in conflict with the Constitution or a law of the "United States, is an affair between the Government of Dela- "ware and its citizens, of which this court can take no cogni- "zance."

So in the case of *Gilman* v. *Philadelphia*, decided in 1865, the case turned entirely upon the point whether the State statute authorizing the construction of a bridge across the Schuylkill was in conflict with the clause of the Federal Constitution empowering Congress to regulate commerce.

The court decided that it was not; that until Congress had legislated otherwise the States were free to act in such cases for the public benefit.

"Until the dominant power of the Constitution is awakened "and made effective by appropriate legislation the reserved "power of the States is plenary and its exercise in good faith "cannot be made the subject of review by this court."

No question was made or disscusse as to the impairment of any contract or as to the deprivation of rights without compensation.

On the contrary, the court decided in the *Black Bird Creek Case* that the question was one between the State of Delaware

and its citizens whether they or any of them had been deprived of rights for public use without compensation.

That question under the then Federal Constitution was not a federal question.

Effect of Fourteenth Amendment.

All this has been changed by the terms of the Fourteenth Amendment, and federal questions have been created and limitations imposed upon State power that did not exist before.

Slaughter House cases, 16 Wall., 36.
Bartemeyer v. *Jones,* 18 Wall., 133.
Mugler v. *Kansas,* 123 U. S., 623.

"The Fourteenth Amendment, which was finally adopted "July 28th, 1868, largely expanded the power of the Federal "courts and Congress and for the first time authorized the "former to declare invalid all laws and judicial decisions of "the States abridging the rights of citizens or denying them the "benefit of due process of law."

Holden v. *Hardy,* 169 U. S., 382.

The cases of *Pound* v. *Turck,* 95 U. S., 459, and *Lake Shore & Mich. Southern Ry.* v. *Ohio,* 173 U. S., 285, also both turned upon the question of the conflict of the State statute with the change of the Federal Constitution empowering Congress to regulate commerce as in the case of *Leovy* v. *U. S.,* 177 U. S., 621.

There was no question in either of these cases of the effect of a contract or of the deprivation of property without compensation.

Public Right Involved

The contention of defendants below was that in view of the public character of the right involved in the contract, it was subject to impairment, *i. e.,* that the complainant entered into the contract with the knowledge that the State had the right by reason of its subject matter to discharge the defenders from its performance, and rely on the cases of *Legal Tender Cases,* 12 Wall., 551, and *Mitchell* v. *Clark,* 110 U. S., 633.

In those cases this court decided that where the abrogation of a contract was the indirect result of an act passed in pursu-

ance of some express constitutional power, as a bankrupt act discharging bankrupts from their debts—lodged by the Federal Constitution in Congress, all parties to the contract must be presumed to have contracted with a view to the possible exercise of this power.

The inapplicability of these cases to the present is clear:

1. The provision forbidding the impairment of contracts applies to the States, not to Congress.

"It is no answer to this to say that it interferes with the "validity of contracts for no provision of the Constitution of "the United States prohibited Congress from doing this, and it "does the States."

Mitchell v. *Clark*, 110 U. S., 643.

No State can pass a law discharging a bankrupt from all his debts.

2. If the contract was subject to impairment by an exercise of the police power, then there must be a valid, not a pretensive, exercise of that power.

A man can, if he chooses, for consideration, forego the exercise of a public right. He can bind himself not to carry on a lawful trade or calling within a particular locality. He can bind himself to forego the exercise of any right which shared in common with all other citizens of the State, is not one which, like the right of freedom or the ballot, is essential to the continuance and existence of society.

Oregon Steam Nav. Co. v. *Winsor*, 20 Wall., 64.
Hulse v. *Bonsack Mach. Co.*, 65 Fed. Rep., 867.
Printing Co. v. *Sampson*, L. R. 19 Eq., 462.

A contract not to practice law in a particular place is valid.

A contract not to practice medicine in a particular locality is valid.

A contract not to carry on a specified trade in a particular district is valid.

A contract not to engage in steam transportation on a particular river is valid.

Where an individual has for full consideration made a valid contract within one of the above categories, can the State, by a statute passed for the benefit of that particular individual, absolve him from the performance of his contract on the ground that the contract was on a matter of public right, and that the State, in the exercise of its police power, can dissolve all such contracts?

We submit such a proposition cannot be supported on any line of logical reasoning or by any adjudicated precedent.

QUESTIONS UNDER THE STATE CONSTITUTION.

1.

The Statute is Special Legislation.

The Constitution of South Carolina provides, Art. III, Section 34:

"The General Assembly of the State shall not enact local or "special laws concerning any of the following subjects, or for "any of the following purposes, to-wit:

* * * * * * *

"II. To lay out, open, alter or work roads or highways."

This provision has been construed by the Supreme Court of the State of South Carolina.

"In order that a law may be general, it must be of force in "every county in the State; and while it may contain special "provisions making its effect different in certain counties, those "counties cannot be exempt from its entire operation."

Dean v. *Spartanburg,* 59 S. C., 110.
State v. *Queen,* 62 S. C., 250.
Grocery Co. v. *Burnett,* 61 S. C., 211.

The Supreme Court of South Carolina has decided a navigable stream to be a highway—

Heyward v. *Chisolm,* 11 Rich., 263.

and it is so declared by the constitutional and statutory provisions already referred to.

The statute in question is not a general act, declaring under what circumstances creeks in the several counties may be closed, but is limited to one creek in one county for the benefit of two individuals.

2.

Private Statute Passed Without Notice.

It is admitted that this statute so greatly affecting the right of complainant was passed without notice to him.

It is equally admitted that at the time of its passage there was in existence a law forbidding its introduction into, and passage by the General Assembly of such an act without notice and publication.

(Sections 31 and 34 of the Code of Laws 1902, in appendix.)

The very object of such a law was to protect individuals in their rights by prohibiting the passage of measures injurious to those rights without proper notice to the parties to be affected.

It is true this was a statutory, not a constitutional, provision, but it was the *law*, and as the law, binding upon the General Assembly until repealed or changed in a valid and constitutional manner. The acts of the Legislature are the law, and bind every succeeding Legislature until legally altered.

This statute prohibiting the passage of such measures without notice is still the law. It has never been repealed.

We have the case here then presented of a statute claimed to be of force, which has been passed in direct and flagrant violation of the provisions of law existing at the time of its passage and still existing.

It is the rule in many States, as in this court, with regard to the acts of Congress, that the court cannot look behind the authentication by the proper officers of the General Assembly as to the passage of an act.

Such is not the rule in South Carolina.

There it has been held that the court can go behind the authentication of the act by the presiding officers of the houses and ascertain if the constitutional requirements for its passage had been observed.

State v. *Smalls,* 11 S. C., 262.
Bond Cases, 12 S. C., 200.
State v. *Chester,* 39 S. C., 307.

The demurrer admits that none of the necessary preliminaries for the introduction and passage of this act have been complied with.

It was passed through the legislature notwithstanding the existence of the law.

The question then is, has a statute regulating the method whereby legislation can be enacted no more effect than a mere rule of procedure?

The existing statute was no mere rule of either house. It was law, the result of the action of the entire legislature and approved by the governor. If being law it has no effect as law it would mean that it was useless to place it on the statute book.

It was a statute intended for the protection of the rights of property holders. It was a declaration to them that no special personal franchise or privilege would ever be granted by the State affecting their rights and property, save after full notice and an opportunity to be heard.

As a statutory declaration of that kind it entered into the element of vested rights in like manner as any other statute guaranteeing to the future purchaser of property security in his possession thereof.

HENRY A. M. SMITH,
Counsel for appellant.

APPENDIX.

Extract from the Statutes of South Carolina Code of Laws, 1902.

ARTICLE III.

INTRODUCTION OF MEASURES FOR PRIVATE PURPOSES.

Section 31. No bill to charter or incorporate, or to amend the charter of any society, company organization, or body politic of any kind, or for the granting of any privilege or immunity or for any other private purpose whatsoever, shall be introduced or entertained in either House of the General Assembly, except by petition, to be signed by the person or persons seeking to be incorporated, or by the corporators or their officers, or duly appointed agents, seeking an amendment of a charter, or by the

person or persons seeking such privilege, immunity or other private grant or relief. The petition must be accompanied in each instance by a draft of a bill or joint resolution, as the case may be, to charter or incorporate such society, organization or body politic, or to amend the charter thereof, or to grant the privilege or immunity, or to carry out the private purpose prayed for in said petition; and together with the said draft of the bill or joint resolution, shall be referred to some appropriate committee of the House in which such petition is presented, to be acted upon by such committee as hereinafter provided.

* * * * * * *

Section 34. In any case other than that of a charter or incorporation, the petition shall set forth fully and distinctly the merits and particulars of the case, and if the same shall in any wise affect the rights of others directly who reside in this State, such petition shall be accompanied with proof that the parties, so far as known, who may be affected merely, have had sixty (60) days' notice of the presentation of such petition, before such petition is presented, and also that notice of the intention of the petitioner or petitioners to make such application has been published in a newspaper having the largest circulation published in the county where the privilege or immunity is to be enjoyed, once a week for at least three weeks, the first of which publications shall be at least sixty (60) days before such petition is presented.